



Governors Baloon Safari Limited v Skyship Company Limited & another (Civil Case 461 of 2008) [2022] KEHC 230 (KLR) (Commercial and Tax) (24 March 2022) (Ruling)

Neutral citation: [2022] KEHC 230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 461 OF 2008
WA OKWANY, J
MARCH 24, 2022**

BETWEEN

GOVERNORS BALOON SAFARI LIMITED PLAINTIFF

AND

SKYSHIP COMPANY LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF NAROK 2ND DEFENDANT

RULING

1. The plaintiff herein sued the defendants through the plaint dated 14th August 2008 and amended on 17th September 2008. The 2nd defendant in opposed the suit through a statement of defence and counterclaim dated 14th September 2008 and amended on 6th October 2008. The 2nd defendants counterclaim was however dismissed for want of prosecution and the plaintiff was awarded the costs of the suit thus precipitating the filing of a Bill of Costs and a ruling (hereinafter “the 1st taxation”) delivered on 31st October 2016 and a certificate of taxation was issued on 9th November 2016.
2. The 2nd respondent challenged the 1st taxation through a reference and in a ruling on 11th December 2018, the court ordered for a fresh taxation. The Bill of Costs was thereafter subjected to a second taxation after which the Taxing Master delivered her ruling on 31st May 2019.
3. The applicant herein was dissatisfied with the outcome of the 2nd taxation and filed the reference dated 20th June 2019 (that is the subject of this ruling) seeking the following orders: -
 1. That the decision made by the Deputy registrar on 31st May 2019 as the Taxing Officer, to award the Plaintiff party and party costs in the total sum of Kshs. 20,165,806.00 be reversed.
 2. That this honourable court be pleased to assess and quantify the Plaintiff’s party and party costs as prescribed under the law.



3. That the costs of this application be provided for.
4. The application is premised on the grounds that: -
 1. The learned Taxing Officer erred in principle as she arrived at a decision which is contrary the law applicable.
 2. The Learned Taxing officer misapprehended and misapplied the law and principles of taxation in the nature of the suit giving rise to the taxation and failed to apply correctly the principles of taxation in the nature of the suit giving rise to the taxation and failed to apply correctly the principles and formula provided for in schedule VI of the Advocates Remuneration Order 2006 for assessing the instruction fees.
 3. The learned Taxing officer erred in law and fact by failing to exercise the powers and discretion granted to her under the Advocates Remuneration Order properly.
 4. The learned Taxing officer did not apply her mind properly on the Suit, the bill of costs and the written submissions on the taxation on the quantum of costs as filed by the 2nd defendant and thereby arrived at an erroneous decision.
 5. The learned taxing officer erred in law and fact by arriving at an improper determination on the value of the subject matter of the suit.
 6. The taxing officer erred in law and in fact by arriving at an erroneous decision on the taxation by failing to give due and/or proper consideration to the relevant factors of the case including but not limited to the
 - a. Nature and importance of thee suit giving rise to the taxation
 - b. Interest of the parties
 - c. Value of the subject matter
 - d. Public interest in the subject matter
 - e. Importance and complexity of the matter
 - f. Conduct of the proceedings
 - g. Labour expended and the responsibility undertaken by the 2nd defendant in the matter
 - h. And all other relevant circumstances.
 7. The learned taxing master misapprehended and grossly misdirected herself on the principles of law enunciated in the authorities cited by the parties and/or misapplied them in the taxation herein thereby arriving at an erroneous decision.
 8. The learned taxing officer erred both in law and fact in awarding the plaintiff costs which in all the circumstances of the suit are manifestly disproportionate to the suit, unreasonable and so excessively high as to amount to substantial oppression and injustice to the 2nd defendant.
 9. It is in the interest of justice that the orders sought herein do issue.
5. The respondent opposed the application through the replying affidavit of its Managing Director Mr. Dominic Grammaticas who avers that that the 2nd defendant can only challenge the decision of the Taxing Master on the basis that she did not comply with the court's decision of 11th December 2018



6. Parties canvassed the application by way of written submissions.
7. I have considered the pleadings filed herein and the parties' respective submissions. The main issue for determination is whether the Taxing Master erred in law and principle while taxing the bill of costs.
8. The applicant's case was that the Taxing Master erred in principle in holding that the value of the subject matter in the original suit was similar and/or equal to the value of the Subject matter in the counterclaim. According to the applicant, the value of the subject matter of the suit could not be the same as the value of the counterclaim. The applicant further contended that the Taxing Master's adoption of the same award that was made to the 1st defendant in a previous taxation was erroneous.
9. The respondent, on the other hand, submitted that the Taxing Master properly applied the law and arrived at the correct decision as she considered the subject matter of the suit as presented in the plaint and counterclaim.
10. The Taxing Master observed as follows in the impugned ruling: -

“

“(5) I have considered the subject matter in the plaint which was allowed in the 1st and 2nd taxation as Kshs 22,847,000/- and adopt the same. The counterclaim also prayed for payment of US\$ 400 per day with effect from 4th August 2008.

....

I have considered the other prayers and the interest of the parties in the suit as well as the general conduct of the suit I use my discretion and the observation by the judge hearing the reference that the matter in question is complex. I increase the amount to Kshs 4,000,000.

The total instruction fees is Kshs 26,847,000/- the matter was dismissed for want of prosecution making the amount to be awarded at 75%. The item on instruction fees is taxed at Kshs. 20,135,250/.”

11. It is trite that the court ought not to interfere with the findings of the Taxing Master unless there is an error in principle. In the case of *Joreth limited vs Kigano & Associates* (2002) 1 E.A 92 the court stated that; -

“the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant factors.”

12. Similarly, in *Peter Muthoka & Another vs Ochieng & 3 others* [2019] eKLR, the Court of Appeal held as follows: -

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the



value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive. What we have said is in direct harmony with what this Court stated in *Joreth Limited -vs- Kigano & Associates (Supra)*.”

13. In the present case, I note that that the counterclaim was dismissed for want of prosecution. I further note that the dispute between the parties revolved around an alleged breach of contract that placed the estimated loss at Kshs 1.5 Billion. The court directed the Taxing Master to consider the previous taxations between the parties, which she did and allowed the instruction fee as Kshs 22,847,000. I also note that the Taxing Master considered the prayers in the counterclaim and exercised her discretion by increasing the amount by Kshs 4,000,000.
14. In *Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR* the Court of Appeal held as follows: -

“On reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”
15. Having regard to the findings and observations that I have made in this ruling, I find that the Taxing Master exercised her discretion and correctly taxed the bill of costs. I do not find any error of principle to warrant this courts interference with the ruling. I find that the Taxing Master was right in ascertaining the value of the subject matter in the whole suit.
16. In the upshot, I find that the reference dated 20th June 2019 lacks merit and I therefore dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kipruto for Oyatsi for plaintiff.

Mr. Kere for 2nd defendant/applicant.



Court Assistant: Abdi

